

Full Disclosure ... or Not: That Is the Question!

Presented by
John Westrick

Senior Assistant Attorney General
Office of the Attorney General



FORUM2013

Access to Procurement Records: VPPA Balances Competing Interests

- **Conceal for Sake of Fairness (and Effectiveness) of Competition:**
 - Vendor cannot see competing bids/offers
 - Vendor Willing to Reveal Trade Secrets & Proprietary Information to Public Body
 - Why No Public Access During Competition?
- **Reveal for Sake of Public and Vendor Confidence in Procurement Program**



FORUM2013

Exceptions to Public Access:

Cost Estimates

§ 2.2-4342. Public inspection of certain records.

A. Except as provided in this section, **all** proceedings, records, contracts and other **public records relating to procurement transactions shall be open to the inspection** of any citizen, or any interested person, firm or corporation, in accordance with the Virginia Freedom of Information Act (§ 2.2-3700 et seq.).

B. **Cost estimates** relating to a proposed procurement transaction prepared by or for a public body **shall not be open to public inspection.**



FORUM2013

Preservation of Records

§ 42.1-86.1. Disposition of public records.

A. ... **No agency shall destroy or discard a public record unless** (i) the record appears on a records retention and disposition schedule approved pursuant to § 42.1-82 and **the record's retention period has expired....**

§ 2.2-3704. Public records to be open to inspection....

A. ... **The custodian of such records shall take all necessary precautions for their preservation and safekeeping.**



FORUM2013

Exceptions to Public Access: Procurement Records v. Proposal Records

§ 2.2-4342. Public inspection of certain records.

D. Any competitive negotiation offeror, upon request, shall be afforded the opportunity to inspect **proposal records** within a reasonable time after the evaluation and negotiations of proposals are completed but prior to award, except in the event that the public body decides not to accept any of the proposals and to reopen the contract. Otherwise, **proposal records** shall be open to public inspection only after award of the contract.



FORUM2013

Consequence For Improper Disclosure: Proposal Information

§ 2.2-4364. Legal actions. .

C. [The] proposed award or the award of a contract ... **shall be reversed only if** the petitioner establishes that the proposed award or the **award is not** (i) an honest exercise of discretion, but rather is arbitrary or capricious or (ii) **in accordance with** the Constitution of Virginia, **applicable state law** or regulation, or the terms and conditions of the Invitation to Bid or Request for Proposal.



FORUM2013

Form of Reply to Records Request: Full Access Granted

§ 2.2-3704. Public records to be open to inspection....

B. A request for public records shall identify the requested records with reasonable specificity.... [T]he custodian ... shall promptly, but in all cases **within five working days** of receiving a request, **provide the requested records** to the requester **or make one of the following responses in writing:**



FORUM2013

Form of Reply to Records Request: Requested Record Withheld

§ 2.2-3704. Public records to be open to inspection....

B. ... make one of the following responses in writing:

1. The requested records are being **entirely withheld** because their release is prohibited by law or the custodian has exercised his discretion to withhold the records in accordance with this chapter. Such response shall identify with reasonable particularity the **volume** and **subject matter** of withheld records, and cite, as to each category of withheld records, **the specific Code section** that authorizes the withholding of the records.



FORUM2013

Form of Reply to Records Request: Part of Requested Record Withheld

§ 2.2-3704. Public records to be open to inspection....

B. ... **make one of the following responses in writing: ...**

2. The requested records are being **provided in part and are being withheld in part** because the release of part of the records is prohibited by law or the custodian has exercised his discretion to withhold a portion of the records in accordance with this chapter. Such response shall identify with reasonable particularity the **subject matter** of withheld portions, and cite, as to each category of withheld records, **the specific Code section** that authorizes the withholding of the records....



FORUM2013

Exceptions to Public Access: Proposal Records

§ 2.2-4342. Public inspection of certain records.

A. Except as provided in this section, **all proceedings, records, contracts and other public records relating to procurement transactions shall be open to the inspection of any citizen**, or any interested person, firm or corporation, in accordance with the Virginia Freedom of Information Act (§ 2.2-3700 et seq.).

...

D. ...**proposal records shall be open to public inspection only after award of the contract.**



FORUM2013

Redaction: Must Public Body Redact Record that Contains Exempt Information?

§ 2.2-3704. Public records to be open to inspection....

B. ... **make one of the following responses in writing: ...**

2. The requested records are being provided in part and are being withheld in part **When a portion of a requested record is withheld, the public body may delete or excise only that portion of the record to which an exemption applies and shall release the remainder of the record.**

Virginia-Pilot Media Cos. v. City of Norfolk School Board (2010)
(FOIA does not require redaction when an individual record is wholly or partially exempt from disclosure).



FORUM2013

Exceptions to Public Access: Trade Secrets & Proprietary Information

§ 2.2-4342. Public inspection of certain records.

F. **Trade secrets or proprietary information** submitted by a bidder, offeror or contractor in connection with a procurement transaction ... **shall not be subject to the Virginia Freedom of Information Act** (§ 2.2-3700 et seq.); however, the bidder, offeror or contractor shall (i) invoke the protections of this section prior to or upon submission of the data or other materials, (ii) identify the data or other materials to be protected, and (iii) state the reasons why protection is necessary.



FORUM2013

Improper Denial of Access: Consequences

§ 2.2-4360. Protest of award or decision to award.

A. ... **[I]f the protest** of any actual or potential bidder or offeror **depends** in whole or in part **upon information** contained in public records pertaining to the procurement transaction that are **subject to inspection under § 2.2-4342**, then the time within which the **protest shall be submitted** shall expire **ten days after those records are available** for inspection by such bidder or offeror under § 2.2-4342, or at such later time as provided in this section....



FORUM2013

Improper Denial of Access: Consequences

§ 2.2-3713. Proceedings for enforcement of [FOIA].

D. ... [T]he petitioner shall be entitled to recover **reasonable costs ... and attorneys' fees** from the public body if the petitioner substantially prevails on the merits of the case, unless special circumstances would make an award unjust....

§ 2.2-3714. Violations and penalties.

[T]he court, if it finds that a **violation was willfully and knowingly made**, shall impose upon such officer, employee, or member ... a **civil penalty of not less than \$500** nor more than \$2,000....



FORUM2013

Exceptions to Public Access: Proposal Records after Cancelling IFB/RFP

§ 2.2-4342. Public inspection of certain records.

D. Any competitive negotiation **offeror**, upon request, **shall be afforded the opportunity to inspect proposal records** within a reasonable time after the evaluation and negotiations of proposals are completed but prior to award, **except in the event that the public body decides not to accept any of the proposals and to reopen the contract**. Otherwise, proposal records shall be open to public inspection only after award of the contract.



FORUM2013

Access to Procurement Records: Out-Of-State Offerors

FOIA § 2.2-3704. Public records to be open to inspection....

A. Except as otherwise specifically provided by law, all public records shall be open to inspection and copying **by any citizens of the Commonwealth** during the regular office hours of the custodian of such records....

VPPA § 2.2-4342. Public inspection of certain records.

A. [A]ll ... public records relating to procurement transactions shall be open to the inspection of any citizen, **or any interested person**, firm or corporation, in accordance with the Virginia Freedom of Information Act (§ 2.2-3700 et seq.).



FORUM2013

Questions?



FORUM2013